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EXAMINER

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UNITED STATES PATENT AND TRADEMARK OFFICE

**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Ex parte DAVID W. KOENIG and LISA MARIE KROLL

Appeal 2008-2620
Application 10/608,661
Technology Center 3700

Decided: August 29, 2008

Before DONALD E. ADAMS, RICHARD M. LEBOVITZ, and
MELANIE L. McCOLLUM, *Administrative Patent Judges*.

McCOLLUM, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134 involving claims to a wet wipe and a method that uses a wet wipe for improving skin health. The Examiner has rejected the claims as obvious. We have jurisdiction under 35 U.S.C. § 6(b). We reverse.

STATEMENT OF THE CASE

Claims 1-30 are pending and on appeal. We will focus on claim 1, which is representative and reads as follows:

1. A wet wipe for improving skin health comprising a wipe substrate and a liquid formulation, the liquid formulation comprising a *Yucca* species extract and a broad spectrum antimicrobial.

Claims 1-5 and 7-30 stand rejected under 35 U.S.C. § 103(a) as obvious in view of Howard (US 6,552,171 B2, Apr. 22, 2003) (Ans. 3).

Claim 6 stands rejected under 35 U.S.C. § 103(a) as obvious in view of Howard and Sato (JP 2001-011496A, Jan. 16, 2001) (Ans. 7).

The Examiner relies on Howard for teaching “a hydrolyzed jojoba protein solution for use in skin lotions, creams, and sanitizing wipes” (Ans. 3). The Examiner finds that “Howard teaches compositions for hand lotion (Col. 8, Table 6) and hand cream (Col. 9, Table 7) comprising said jojoba protein solution, as well as *Yucca* extract and green tea extract, which contains catechin, considered here as a broad spectrum antimicrobial” (*id.*).

The Examiner argues that “Howard does not explicitly teach a wipe substrate, however since Howard teaches that said solution is intended for use on a sanitizing wipe, it would be obvious to one of ordinary skill in the art to apply said solution to a sanitizing wipe substrate with a reasonable expectation of success” (*id.*) The Examiner also argues:

[T]he sanitizing wipes taught by Howard would absolutely be used on a person’s hands, thus a formulation that is a hand lotion or hand cream would certainly be suitable for use with said sanitizing wipes, and it would certainly be obvious to one of ordinary skill in the art to use them in this manner.

(*Id.* at 9-10.)

Appellants contend that “the only disclosure anywhere in Howard, et al. of a Yucca extract is in Tables 6 and 7 of the Examples . . . , which merely list Yucca extract as one ingredient in a list of ingredients that may be used to make hand lotion (Table 6) and moisturizing hand cream (Table 7)” (App. Br. 6). Appellants argue that the “hand lotion and moisturizing hand cream disclosed in Tables 6 and 7 of Howard, et al. (which also comprise green tea extract) are not, however, a disclosure of a liquid formulation for use with a wet wipe” (*id.* (emphasis omitted)).

Appellants also contend that “there is no motivation or suggestion to modify the teachings of Howard, et al. to arrive at applicants’ claimed wet wipe” (*id.*). In particular, Appellants argue that “one skilled in the art would not be motivated to incorporate into the sanitizing wipe listed in column 3, line 11 of Howard, et al., the specific combination of *Yucca* species extract and green tea extract, which is solely disclosed in an unrelated embodiment” (*id.*). Additionally, Appellants argue:

There is no teaching or suggestion in Howard, et al. that the hand lotion or moisturizing hand cream formulations set forth in Tables 6 and 7 would . . . be suitable for incorporation into a sanitizing wipe. In fact, it is just as likely that such formulations may even interfere with the sanitizing ability of a sanitizing wipe. There is simply nothing in Howard, et al. that suggests this combination.

(*Id.* at 10.)

ISSUE

The issue is whether the Examiner has set forth a *prima facie* case that it would have been obvious to incorporate the hand lotion or cream

formulations disclosed in Tables 6 and 7 of Howard, which include Yucca Extract and Japanese Green Tea Extract, into a sanitizing wipe.

FINDINGS OF FACT

1. Howard discloses “a new form of jojoba protein, namely hydrolyzed jojoba protein and derivatives thereof, as well as uses of such protein products in cosmetic formulations” (Howard, col. 1, l. 66, to col. 2, l. 2).
2. Howard states that the “jojoba products of the invention can be used to good effect in a variety of cosmetic formulations” (*id.* at col. 2, ll. 52-53).
3. Howard discloses various “cosmetic products which can benefit from incorporation of the jojoba products of the invention,” including sanitizing wipes and skin lotions and creams (*id.* at col. 3, ll. 4-13).
4. In Example 1, Howard discloses “a preferred procedure for the preparation of hydrolyzed jojoba protein” (*id.* at col. 3, l. 45, to col. 5, l. 43, particularly at col. 3, ll. 45-46).
5. In Example 4, Howard discloses various cosmetic products “produced using the hydrolyzed jojoba products . . . described in Example 1” (*id.* at col. 6, ll. 42-44).
6. Among the products described in Example 4 are a hand lotion and a hand cream. The ingredients used to prepare both the hand lotion and the hand cream include Japanese Green Tea Extract and Yucca Extract. (*Id.* at col. 8, l. 36, to col. 9, l. 42.)

ANALYSIS

Howard discloses cosmetic formulations including jojoba products (Finding of Fact (FF) 1). Howard discloses incorporating these jojoba products into various cosmetic products, including sanitizing wipes (FF 2-3). Howard specifically discloses formulations for hand lotion and cream including both Japanese Green Tea Extract and Yucca Extract (FF 6). The Examiner acknowledges that Howard does not disclose a wet wipe comprising a wipe substrate and a formulation containing Japanese Green Tea Extract and Yucca Extract (Ans. 7).

The relevant question is “whether there was an apparent reason to combine the known elements in the fashion claimed by the patent [application] at issue.” *KSR Int’l v. Teleflex Inc.*, 127 S. Ct. 1727, 1741 (2007). We agree with Appellants that the Examiner has not provided an adequate explanation as to why one of ordinary skill in the art would have incorporated the hand lotion or cream formulations containing both Japanese Green Tea Extract and Yucca Extract into a sanitizing wipe.

The Examiner argues:

Howard state[s] that the[] cosmetic products [at column 3, lines 4-13,] can benefit from the jojoba **product** of the invention, not the protein by itself. Otherwise, why would Howard disclose, *inter alia*, sixteen tables worth of compositions, containing jojoba protein with other ingredients? . . . What else would the phrase “jojoba products of the invention” be referring to other than the at least sixteen different liquid formulations of the invention that contain at least the jojoba protein?

(Ans. 9.) The Examiner appears to be arguing that Howard suggests including any of the specific formulations recited in Example 4 into any of

the cosmetics products recited at column 3, lines 4-13, which include sanitizing wipes. We do not agree. Instead, we agree with Appellants (App. Br. 9) that Howard uses the expression “jojoba products of the invention” to refer to the hydrolyzed jojoba protein and derivatives thereof (*see* FF 1-5, which demonstrate that Howard discloses incorporating the “jojoba products” into a cosmetic product).

As a result, we find that Howard teaches incorporating the hydrolyzed jojoba proteins and derivatives thereof into a sanitizing wipe. We do not agree that the Examiner has shown that it would have been obvious to incorporate the specific hand lotion or cream formulations described in Howard into a sanitizing wipe. In particular, we do not agree that merely pointing out that sanitizing wipes would be used on a person’s hands (Ans. 9) is sufficient to show that there was reason to combine the various elements disclosed within Howard to achieve the composition of claim 1. We therefore reverse the obviousness rejection of claim 1 and of claims 2-5 and 7-30, which also recite or depend from a claim that recites a wet wipe comprising a wipe substrate and a Yucca species extract.

Claim 6 depends from claim 1. We have already concluded that the Examiner has not set forth a prima facie case that claim 1 would have been obvious over Howard. The Examiner relies on Sato for the limitation recited in claim 6, and has not pointed to any disclosure in Sato that would make up for the deficiency discussed above (Ans. 7). Thus, we conclude that the Examiner has not set forth a prima facie case that claim 6 would have been obvious. We therefore reverse the obviousness rejection of claim 6.

CONCLUSION

The Examiner has not shown that the claims would have been obvious to a person of ordinary skill in the art based on the applied references. We therefore reverse the rejection of claims 1-30.

REVERSED

clj

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